



Exceptions

Guidance on the Chesapeake Bay Preservation Area Designation and Management Regulations

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Purpose:

This document provides local planners and officials with guidance when considering exceptions to requirements of the Chesapeake Bay Preservation Area Designation and Management Regulations as implemented at the local level.

The Regulations provide authority for local relief mechanisms in cases where a development proposal cannot meet the regulatory requirements due to a unique set of circumstances and conditions. The Regulations also outline a process by which adjacent property owners and other concerned citizens are to be included in the exception review and decision-making process.

Regulations:

- Section 9 VAC 10-20-130.1.a requires a Water Quality Impact Assessment (WQIA) for any proposed land disturbance in a Resource Protection Area.
- Section 9 VAC 10-20-150.C.1 permits exceptions to the General Performance Criteria (9 VAC 10-20-120) and the Development Criteria for Resource Protection Areas (9 VAC 10-20-130) and sets forth the findings that must be made in granting the exception request.
- Section 9 VAC 10-20-150.C.2 requires that local governments design and implement a process for considering exception requests and sets forth the public notice and public hearing requirements for considering certain exception requests.
- Section 9 VAC 10-20-150.C.3 permits exceptions to the other provisions of the Regulations and sets forth the requirements for granting such exception requests.
- Section 9 VAC 10-20-150.C.4 addresses the alteration or expansion of nonconforming principal structures. Such activity does not require a formal exception; however, it does require that the findings set forth in 9 VAC 10-20-150.C.1 are made through a local administrative review process.

Discussion:

Webster's Ninth New Collegiate Dictionary defines the term "exception" to mean "a case to which a rule does not apply," and it is in this manner that the term is used for purposes of this guidance. An analogous term familiar to many in the planning and land use profession is "variance." The Department recognizes that there are instances where the full measure of the Regulations can not be imposed, and where exceptions to the Regulations could be made.

The Regulations distinguish between exceptions for proposed development activities within Resource Protection Areas, those relating to the general performance criteria, and other requests for exceptions not

included in the first two situations. The Regulations differentiated between these types of exception requests in order to ensure that each was reviewed in the most appropriate forum. For instance, the requirement that any exception request relating to RPA issues be considered in a public forum was included because of complaints by citizens that they were afforded no notice or input on such requests. Other exception requests may be considered in a more administrative manner, in part because such requests do not have the same potential impact on adjacent properties.

Exceptions Generally

The exception process is intended to identify the minimum relief necessary to permit the proposed use. To assist in this determination, a Water Quality Impact Assessment (WQIA) is to be used in evaluating the site of the proposed exception, the potential effects of the exception, and for identifying mitigation measures that are appropriate to counteract those effects. The WQIA is to be reviewed **prior** to action on the exception request. Also, all land disturbances or development in the RPA require the preparation and consideration of a WQIA.

The approval of any exception must be based upon the making of certain findings. For exceptions dealing with the General Performance Criteria or for activity in the RPA, findings outlined in Section 9VAC 10-20-150.C.1 must be addressed. For all other exception requests the findings must determine that it is the minimum necessary to afford relief and that reasonable and appropriate conditions are imposed, as necessary, so that the purpose and intent of the Act are preserved. These requirements are intended to relate not only to the potential water quality impact of the exception request, but are also intended to evaluate the request from an equity perspective and to ensure that exceptions are not arbitrary and capricious, but are decided on the specific facts related to the application. The following is a brief description and discussion of each of the required findings.

The requested exception to the criteria is the minimum necessary to afford relief.

Localities should use the requested exception as a starting point and work with the applicant to refine their proposal to meet the review standards. The terms “minimum necessary to afford relief” is inherently a subjective standard that must be considered on a case-by-case basis, taking into account the specifics of a particular request. When considering the minimum necessary to afford relief, things such as the size of the structure, the types of proposed structures, and the placement of the structures in relation to the size, layout and location of the lot or parcel are important considerations. Some examples of requests that would not be the minimum necessary to afford relief could include an application for an extremely large structure on a given lot or parcel, especially when compared to the size of the structures in the adjacent lots. Another example would be a request for a house that would be located outside of the RPA, but with a large attached deck with a pool that would be located within the RPA. In this instance, the sole reason for the exception request relates, not to a use of the property, but to the extent that the applicant wishes to use the property. In this example, consideration of relocation of the house on the lot or resizing the deck and pool are all potential solutions that may result in the property owner achieving their desired use without the need for an exception. Should alternative location, sizing, or orientation options to avoid the need for an exception be available, and the applicant chooses to continue with the exception request, then the finding of “minimum necessary to afford relief” would not be present.

Granting the exception will not confer upon the applicant any special privileges that are denied by this Part IV to other property owners who are subject to its provisions and who are similarly situated.

This finding is intended to make sure that an exception request would not give the applicant something that has been denied to others in similar situations, and gets to the equity, fairness, and arbitrary and capricious aspects of any exception request and decision. For instance, a property owner requests an exception to build a pool in the RPA and neighbors have applied for and been denied a similar request. In this instance, if the exception is approved, a special privilege has been permitted for one neighbor but not the others.

The exception request is in harmony with the purpose and intent of this Part IV and is not of substantial detriment to water quality.

As the purpose of the Regulations is to protect water quality, this is the finding that should focus on the protection of water quality. The appropriate vehicle for determining whether water quality will be adequately protected should a given request be approved, is the Water Quality Impact Assessment (WQIA).

The exception request is not based upon conditions or circumstances that are self-created or self-imposed.

This finding is somewhat related to the first finding, that the request is the minimum to afford relief, however it is different in that this finding focuses more on the actions of the property owner. For instance, if a lot area is 10,000 square feet, and encumbered by the RPA, then a property owner's desire to place a 7,000 square foot house on the lot would essentially be a self-imposed condition, in that a smaller house would be more suitable for the lot size. In general this finding relates, in most cases, to a property owner's failure to realize that their property is not suited for their intended use. When the circumstance for the request is "self-created", the request should be denied by the local body, board or commission.

Reasonable and appropriate conditions are imposed, as warranted, that will prevent the allowed activity from causing a degradation of water quality.

Conditions should be imposed to ensure, among other things, that water quality is protected, and that the function of the undisturbed RPA remains. Conditions should be based, in part, upon the findings of the WQIA, as well as the specific situation of the lot or parcel on which the exception request was permitted. In addition to possible stormwater management BMP requirements to help compensate for the loss of the pollutant removal aspect of the RPA, a locality should investigate opportunities to require additional vegetative plantings elsewhere on the lot or parcel, to boost the functions of the undisturbed RPA. Also, a locality could require additional vegetation to be installed in the remaining portion of the RPA (including the buffer component).

Exceptions to the Regulations, particularly those related to requests for uses and development within RPAs, should be considered in those situations where the property owner can show that the property was acquired in good faith and where, by reasons of the exceptional narrowness, shallowness, size or shape of the property, or where by reasons of exceptional topographic conditions or other extraordinary conditions associated with the owner's property or of immediately adjacent properties, the strict application of the requirements would prohibit or unreasonably restrict the use of the property. It should be noted that it is a well-settled matter of law in Virginia that financial hardship (i.e., wanting to maximize the number of lots in a development; the design or engineering costs associated with compliance: etc.), by itself, is **not** sufficient grounds upon which to grant a variance or, by extension, an exception.

The need for exceptions should be identified as early in the development review process as is possible. This will allow a project to proceed through the review, approval, and construction phases with a minimum of delays, saving both the locality and the applicant time and money. For example, while seeking a building permit to construct a home with a deck that encroaches into the RPA, the applicant states that he intends, in the future, to add a detached garage. Even though the building permit submission only addresses the construction of the primary structure and its deck, the applicant should be encouraged to incorporate the detached garage into the exception request in order to save the time, money, and debate associated with filing a separate exception request when the garage is desired. In this case, the discussion and analysis used in considering the exception for the potential garage may have a direct bearing on the location of the proposed deck, especially if the garage would not be accommodated as an accessory structure, but would be allowed if it were attached to the principal structure.

The exception-granting body is permitted to require reasonable and appropriate conditions in granting the exception request. Examples of reasonable and appropriate conditions that could be considered include re-vegetation to compensate for buffer encroachment or establishment of a buffer where one did not previously exist, requiring the use of porous pavement or other water permeable materials, and requiring the use of level spreaders and dry wells to increase stormwater infiltration. Other measures should also be considered, depending upon the circumstances of each case.

Other forms of regulatory relief should be considered before an exception is pursued. Variances from the side and/or front yard setbacks may be able to accommodate the proposed development and negate the need for the exception. For example, a front yard setback variance may be more appropriate than granting an encroachment into an RPA, depending upon the individual circumstances of the case.

There are several options for fulfilling the requirement of 9VAC 10-20-150.C.2.a, which states that an exception may be considered and acted upon only by the local legislative body; the local planning commission; or a special committee, board or commission. For those localities that incorporate the Regulations into their local Zoning Ordinances, Chesapeake Bay preservation provision exceptions may be considered by the Board of Zoning Appeals in the same manner as a variance request; or, as allowed for under 9VAC 10-20-150.C.2.b, they may be referred to a special board or commission which has been delegated the authority to act on exceptions. For those localities that enact their local Bay Program provisions through a separate, stand-alone ordinance or through multiple provisions throughout their code, exceptions may be acted upon by the governing body, the planning commission, or a special committee, board, or commission that is given that specific authority. A few localities use a special board. Several localities use their planning commission which considers the exception request as a part of the plan of development review process. For those localities that used administrative processes prior to March 2002, they must change their processes to meet the requirement of 9VAC 10-20-150.C.2.a by March 1, 2003.

Appeals of decisions related to exceptions granted by the Board of Zoning Appeals should be administered similarly to other appeals related to variance decisions. This most often involves an appeal to the local circuit court. Where the exception authority is delegated to some other body (i.e., a special Chesapeake Bay Board or the local Planning Commission, for example), the appeal process may involve the local governing body, the Board of Zoning Appeals (if the local Chesapeake Bay Preservation Ordinance is contained within the Zoning Ordinance), or some other body appointed by the Board of Supervisors or Council. The decision as to how to best accommodate the review, action, and appeal of exceptions is truly dependent upon the unique circumstances of each locality. The CBLAD staff is available to help localities examine this matter and arrive at the best solution for them.

Local governments should recognize that the body designated to consider exception requests might need to be trained in the particular requirements of the local Chesapeake Bay preservation ordinance. The CBLAD staff is available to assist in this effort. Additionally, careful consideration should be given to the makeup of any special board or commission created to consider exception requests. A balanced membership could include individuals with land use planning experience, engineers, real estate professionals, attorneys, and related professions along with citizen representation.

Localities should design and implement a tracking system for exceptions. The applicant's name, the property address, the tax parcel number, the case number, and a general statement of the type of request should be catalogued so that the locality and the Department can quickly analyze the location of requested encroachments, their disposition, and the types of development activities that are being reviewed. This tracking system can also be used to monitor "serial exceptions." These are properties that have a series of exception requests (i.e., a request for an encroachment for a deck or patio, then a separate request for an accessory building, etc.). The Department discourages "serial exceptions" because the criteria for granting an exception are based on the minimum necessary to provide for use of the property, not convenience or desire for a particular level of development.

Resource Protection Area (RPA) Exception Requests

The requirements for consideration of an exception to the Development Criteria for Resource Protection Areas (§9 VAC 10-20-130) require public notice, public hearing by a committee, board, commission or special body, and the review of the request according to very specific criteria resulting in findings.

The public must be notified of the hearing at which the exception will be considered as required by §15.2-2204 of the Code of Virginia, except that only one hearing is required and first-class mail may be used in notifying qualifying adjacent property owners. The exception may only be granted by the local legislative body, the local Planning Commission or such other board or commission established specifically for the purpose of reviewing and approving exceptions to the locally-adopted Chesapeake Bay Preservation Ordinance. For example, an exception application requesting permission to construct a detached garage within the landward 50' of the RPA buffer on a lot recorded after the date of the local program adoption could not be handled administratively, but rather must be heard by the body charged with granting exceptions. The case could only be heard after the required public notice and during the required public hearing.

Granting the exception must be based on the findings outlined in subdivision a-f of 9 VAC 10-20-150.C (these are listed previously). The findings must be made in writing and a record of the hearing maintained. In deciding the matter, the board must consider a Water Quality Impact Assessment and may impose reasonable conditions upon the applicant. These conditions could include buffer restoration requirements,

types of materials that may be used in the construction, maximum size of the structure, and the exact location of the structure. Other conditions may be warranted and will vary from case to case.

Exceptions for General Performance Criteria

Exceptions to the General Performance Criteria (§9 VAC 10-20-120) may be granted through an administrative review process provided that the same findings required for use or development exceptions in RPAs are made in writing. As these exception requests are not likely to have the same potential impact on similarly situated or adjacent property owners, the Regulations do not require that such requests be considered through the public notice and special body hearing process as those requests relating to RPA issues. Exception requests from the full application of the general performance criteria can be diverse in nature. For example, the 100% reserve drainfield requirement may be set aside through an administrative exception process provided that the request is related to the unusual size, shape, or topography of the parcel and the locality requires conditions such as monitoring of the primary septic system to ensure function, or for a pressurized septic system to ensure more efficient use of the drainfield.

Other Exceptions

All other exception requests may be processed administratively but still require the minimal findings that it is the minimum necessary to afford relief and that reasonable and appropriate conditions are imposed, as necessary, so that the purpose and intent of the Act is preserved.

Conclusions:

Based on these factors, the Department provides the following guidance:

- The requirements for consideration of an exception to the Development Criteria for Resource Protection Areas (§9 VAC 10-20-130) require public notice, public hearing by a committee, board, commission or special body, and the review of the request according to very specific criteria resulting in findings.
- Exceptions to the General Performance Criteria (§9 VAC 10-20-120) may be granted through an administrative review process provided that the same findings required for use or development exceptions in the Resource Protection Area are made in writing.
- Exceptions to the Regulations should be granted in those situations only where the property owner can show that the property was acquired in good faith and where, by reasons of the exceptional narrowness, shallowness, size or shape of the property, or where by reasons of exceptional topographic conditions or other extraordinary conditions associated with the owner's property or of immediately adjacent properties, the strict application of the requirements would prohibit or unreasonably restrict the use of the property in question.
- The Department recognizes that localities may have incorporated the Regulations into their local Zoning Ordinances. In those instances, Chesapeake Bay preservation provision exceptions may be considered by the Board of Zoning Appeals in the same manner as a variance request or they may

be referred to a special board or commission to which the authority to review such requests has been delegated.

- Localities must review a Water Quality Impact Assessment (WQIA) prior to acting on an exception involving modification of or encroachment into an RPA.
- The need for exceptions should be identified as early in the development review process as is possible.
- Exceptions are to be the minimum necessary to afford relief.
- Other forms of regulatory relief should be considered before an exception is pursued.
- The exception-granting body is permitted to require reasonable and appropriate conditions in granting the exception request.
- Localities should design and implement a tracking system for exceptions.

Exception Review Process

